Petition

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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81-429

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

BERNARD LOUIS BUSHELMAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

BERNARD LOUIS BUSHELMAN
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Petitioner in Pro Per

QUESTIONS PRESENTED

I

CAN LAW ENFORCEMENT SEIZE AND SECURE A RESIDENCE IN THE NIGHTTIME, ARREST THE OCCUPANTS WITHOUT PROBABLE CAUSE, AND THEREAFTER HOLD THE OCCUPANTS UNTIL SUCH TIME AS A SEARCH WARRANT IS OBTAINED?

II

CAN LAW ENFORCEMENT CREATE EXIGENT CIRCUMSTANCES BY ILLEGALLY ARRESTING A PERSON WHO HAS RECENTLY EXITED A RESIDENCE BY DETAINING HIM FOR A SHORT PERIOD OF TIME AND, UPON DISCOVERING THAT, NO CRIME HAVING BEEN COMMITTED, RELEASE THE PERSON THEREBY JUSTIFYING A WARRANTLESS NIGHTTIME ARREST OF ANOTHER PERSON IN HIS HOME?

III

DOES A WARRANTLESS ARREST OF A PERSON IN HIS HOME IN THE NIGHTTIME WITHOUT PROBABLE CAUSE TO BELIEVE THAT THAT PERSON IS ENGAGED IN CRIMINAL ACTIVITY, VIOLATE EQUAL PROTECTION AND DUE PROCESS OF THE LAW?

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The petitioner, appearing in propria persona, respectfully petitions that a Writ of Certiorari be issued to review the judgments of the Court of Appeal, Second Appellate District, State of California, dated December 11, 1980.

OPINIONS BELOW

The only official report of any opinions by inferior Courts is the unpublished opinion by the Court of Appeals of the State of California, Second Appellate District, in the case entitled People of the State of California, Respondent, vs. Bernard Louis Bushelman, Appellant, No. 2D Crim 36804, dated December 11, 1980. This opinion affirmed the judgment of the Superior Court of the County of Los Angeles in a case bearing the same title and numbered A193985. (Appendix A.) The opinion was modified and a rehearing was denied on January 8, 1981. (Appendix B.)

On February 18, 1981, a Petition for Hearing was denied by the Supreme Court of the State of California. (Appendix C.)

JURISDICTION

The Supreme Court has jurisdiction of this matter pursuant to 28 U.S.C. 1257 in that a substantial federal question has been timely and properly raised in all of the courts below. California Penal Code Section 1538.5 provides that evidence seized as a result of an unlawful arrest or seizure can be suppressed. Such a motion was made and denied by the Superior Court. The same grounds were urged in the Court of Appeal and in the Petition for Hearing to the California Supreme Court.

The Federal Constitutional questions involved relate to the violation of the Fourth and Fifth Amendments to The Bill of Rights of that Great Document. The questions presented in this petition are of substantial importance to all of the States and citizens of this country. A proper answer to the questions presented will not only protect the liberty of citizens but likewise establish guidelines for law enforcement.

STATEMENT OF THE CASE

On September 28, 1978, a paid Police informant made contact with one Marquez. At about 9:30 that same night Marquez was driven to the home occupied by the petitioner. Marquez entered the residence and approximately fifteen minutes thereafter returned carrying with him a quantity of hashish. Marquez was arrested approximately one-half mile from the residence.

In the meantime the house had been surveiled, and a person entered wearing a white tennis outfit. He stayed about ten minutes and came out carrying a paper bag. This was about 11:25 p.m. The man in tennis shorts was arrested and searched but his paper bag turned out to contain only an empty beer can. Accordingly, he was released.

The state of mind of the Police officers was that the released suspect would advise the occupants of the residence

(the petitioner herein) of his experience. Thereupon, Police officers rushed to the door and arrested the petitioner together with a female companion. Petitioner demanded a search warrant and an officer left after midnight to obtain the same. The warrant was served at approximately 3:00 a.m. and search continued until 6:00 a.m. From the time of the initial entry into the house petitioner and his female companion were handcuffed and were under arrest. Certain Police officers remained on the premises to "secure" the same pending the arrival of a search warrant. At the time of the entry into the house petitioner and his companion were seated before a large window watching television. The only exigent circumstances relied upon for the warrantless arrest and entry into the house was the state of emergency created by the arrest of the man in white tennis shorts.

Attached hereto in the Appendix is the unpublished opinion by the Court of Appeal setting forth the above fact and supporting the proposition that petitioner has properly raised the substantial constitutional question timely in the lower courts.

REASONS FOR GRANTING PETITION

This Court has heretofore discussed warrantless arrests and searches conducted outside of the judicial process. In Coolidge v. New Hampshire, 403 U.S. 443, this Court with little comment struck down

the practice of allowing Police officers to issue search warrants.

> "Thus, the most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption * * * that the exigencies of the situation made that course imperative.' '(T)he burden is on those seeking the exemption to show the need for it.'"

Coolidge was decided in 1971, yet apparently law enforcement officers in Southern California at least, have failed to follow the dictates of this Court.

On granting of this petition it is requested that this Court take a firm position that all warrantless arrests and entry into a home, particularly during nighttime hours, are void on their face. This doctrine should be strictly enforced with certain minor exceptions hereinafter discussed. What the petitioner requests is not that law enforcement be handicapped in its apprehension and prosecution of criminal offenders, rather that they be required to follow the orderly part of the procedures set forth in our law by presenting to an impartial magistrate

sufficient facts justifying violating the sanctity of the home. Our Constitution should be strictly preserved to avoid occurrences of the not too distant past when the Gestapo went from door to door arresting, searching and seizing persons and property merely because of political belief.

In the case below the prosecution argued and the trial and appellate courts agreed that exigent circumstances existed primarily because of the required release of the man in white tennis shorts whose arrest initially was without probable cause and therefor illegal.

Petitioner concedes that under certain urgency situations law enforcement can be justified in entering a house to make an arrest. However it is urged that these exceptions should be narrowly drawn and strictly construed. Certainly, to allow law enforcement to make an illegal arrest and put into play the emergency doctrine justifying a warrantless entry into a house should be condemned. If this is not done it takes but little imagination to visualize the situations that could be created (as was in this case).

Respectfully submitted,

S/

BERNARD LOUIS BUSHELMAN
Petitioner in Pro Per

APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. BERNARD LOUIS BUSHELMAN, Defendant and Appellant.	2d Crim. No. 36804 (LASC No. A193985)

Appeal from a judgment of the Superior Court of Los Angeles County. Thomas W. Fredricks, Judge. Affirmed.

Gray, Gray & Gray and Dudley Gray for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Criminal Division, S. Clark Moore, Assistant Attorney General, Gary R. Hahn and Richard B. Cullather, Deputy Attorneys General, for Plaintiff and Respondent.

After denial of his motion under Penal Code Section 1538.5 appellant pleaded guilty to possession for sale of cocaine and possession for sale of marijuana and was sentenced to State prison. His appeal is limited to search and seizure issues pursuant to Penal Code Section 1538.5, subdivision (m).

The evidence against appellant was seized on September 29, 1978, in a search of appellant's residence pursuant to a search warrant. Appellant does not contend there was no probable cause of issuance of the warrant. He does contend that circumstances prior to the issuance of the warrant tainted the warrant with illegality.

A reliable police informant, Connie Harding, was contacted on September 28, 1978, by Reginald Marquez. Harding talked to Marquez on a police telephone. Marquez indicated he had a connection and could sell a pound of hash. Harding asked for two pounds but Marquez said he could not sell two pounds because his connection had another client coming and the other pound would be or the other client.

Harding and Undercover Officer Pedrosa met Marquez at the Velvet Turtle restaurant in Redondo Beach. Harding was outfitted with a transmitting device and was surveilled by other officers.

At the restaurant Marquez negotiated a price of $1,800.00 per pound. He displayed a samply which he took out of his boot. He went to a phone and then stated, "I just

called my connection, and it's all set." The three of them got in Harding's car and Marquez directed them to a house at 30533 Rhone Drive in Rancho Palos Verdes, where they arrived about 9:30 p.m. Surveilling officers were following and listening to the transmitting device. On the way Marquez stated that ordinarily he could get two pounds or more but that his connection had another customer coming who was supposed to but a large amount. Marquez said he was to go into the house alone to get the hash, that he would bring it out and that he would have to go back into the house in 15 minutes with the money. Marquez was trying to conceal from his connection that he had brought Harding and Pedrosa to the location.

Marquez was inside the house for 15 to 20 minutes, then returned to the car, telling Harding to get down on the floorboard so his connection could not see her. Marquez pulled from his waistband a green pouch, containing what appeared to be a pound of hashish. After the car was driven about a half mile from the location, Marquez was arrested.

Los Angeles Police Officer Brian Murphy had been surveilling the house. When Marquez came out of the house appellant was standing with him, wearing tan pants and no shirt. Marquez had an object in his hand which he placed in his waistband and then got in the car.

Shortly thereafter Officer Murphy observed another man enter the residence. He was a Caucasian wearing a white tennis

outfit. He carried nothing into the house, stayed 10 minutes, then came out of the house carrying a paper bag, at about 11:25 p.m.

Los Angeles Police Officer Robert Lutz had participated in the arrest of Marquez and had started en route back to Los Angeles to obtain a search warrant, when he was advised by Officer Murphy of the man in tennis clothes entering the house. Officer Lutz was aware that Marquez had told Harding and Pedrosa they could get only one pound because another client was coming. Officer Lutz decided to return to the location instead in order to detain this man. The man in tennis clothes was stopped, but his paper bag turned out to contain only an empty beer can. The man in tennis clothes had to be released. In light of the release of this man and Marquez' statement to Harding and Pedrosa that he was due back with the money in 15 minutes, Officer Lutz decided that the person or persons in the house might miss Marquez or be alerted by the released man in tennis clothes, so he decided to secure the residence pending the obtaining of a search warrant.

Several sheriff's deputies in uniform and several Los Angeles Police Officers dressed either in undercover clothes or police coats approached the door. On the way to the door they passed by the window to a television room where Officer Lutz observed appellant and a female. Appellant had his pants on. Officer Lutz knocked on the door and a voice said, "Who is it?" He yelled, "Los Angelels police Officers" and "You're under arrest for violations of state narcotics laws. Now open the door."

Appellant repeatedly stated, "Wait a minute, wait a minute. I have to put my pants on." Officer Lutz said, "You've already got your pants on. Open the door." He paused another five to ten seconds and again yelled, "Open the door," whereupon appellant opened the door. Appellant was brought out and arrested. Officer Lutz yelled for the female to come to the door also. He heard water running. He entered the residence and went to a bathroom and found the female washing a baggie in the sink.

After appellant denied consent for a search, other officers secured the residence while Officer Lutz left after midnight to go downtown to obtain a search warrant.

A search warrant was obtained at 2:26 a.m. and was served at 3:00 a.m.

Appellant and Christie Clewis testified at the hearing that appellant was naked when the officers came, that they did not hear the officers identify themselves, and that the police broke down the door. A refrigerator repairman who came to appellant's residence around 8 or 8:30 that morning also testified the door appeared damaged, as did two plumbers who came to the house about 10 a.m. The officers denied that there was any forcing or damage to the door.

Appellant raises numerous contentions, none of which we find to have merit. He contends (1) that the court erroneously

placed "the burden of proof" on appellant at the hearing; (2) that the arrest of appellant was without probable cause; (3) that appellant's arrest without a warrant violated People v. Ramey, 16 Cal. 3d 263; (4) that the securing of the residence was unlawful under People v. Shuey, 13 Cal. 3d 835; (5) that the search warrant affidavit did not advise the magistrate of all the material facts; (6) that the search of the house was unduly prolonged; and (7) that the entry into the house violated Penal Code sections 844 and 1531.

The evidence against appellant was obtained in a search pursuant to a search warrant. The People introduced the warrant at the beginning of the hearing, establishing a prima facie case that the evidence was lawfully obtained. It was proper for the court to tell defense counsel to "go ahead" because it is well established that the burden is on the defendant to show the invalidity of a search pursuant to a warrant. (People v. Cook, 22 Cal. 3d 67, 94; Theodor v. Superior Court, 8 Cal. 3d 77, 101; Williams v. Justice Court, 230 Cal. App. 2d 87, 97; People v. Carson, 4 Cal. App. 3d 782, 786; People v. Hernandez, 43 Cal. App. 3d 581, 590; People v. Paris, 48 Cal. App. 3d 766, 771-771.)

Appellant next argues that his mere presence at the house where narcotics were believed to be kept did not constitute probable cause to arrest him, citing Pierson v. Superior Court, 8 Cal. App. 3d 510, 521. However, appellant ignores certain additional facts in the instant case. (Id. at pp. 521-524.) Officer Murphy

had observed appellant talking to Marquez at the doorway of the house as Marquez was leaving. Marquez had an object in his hand which he placed in his waistband. This turned out to be the pound of hashish. This observation together with the prior statements of Marquez about his connection gave probable cause to arrest appellant. (Ming v. Superior Court, 13 Cal. App. 3d 206, 214.)

Appellant's next two contentions may be discussed together, for the both involve whether there were sufficient exigent circumstances to justify (1) arresting appellant without an arrest warrant (People v. Ramey, supra, 16 Cal. 3d 263, 276)9 and (2) securing the residence while a search warrant was obtained. (People v. Shuey, 13 Cal. 3d 835, 849; Shuey v. Superior Court, 30 Cal. App. 3d 535, 540-541.) Prior to the moment that Marquez told Harding and Pedrosa to park in front of the house in question, the police had no prior knowledge connecting that location with the sale of narcotics. Thus, unlike the five-day delay in Shuey there was no lack of diligence by the police in this case. Marquez had explained to Harding and Pedrosa that the reason he could no supply more than one pound of hashish was that a transaction with another client was going to take place that night. Furthermore, he indicated to them that he must go back to the house with the proceeds of the sale within 15 minutes. When Marquez came back to the car displaying the contraband, it was quite proper to arrest him rather than pay him $1,800.00 in public funds and let him go on his way. It was also quite reasonable to

believe that the occupants of the house would miss Marquez when he did not return and might secrete or dispose of any remaining contraband. (Ferdin v. Superior Court, 36 Cal. App. 3d 774, 781-782.) It was likewise proper to detain the man in tennis clothes, as there were very strong grounds to believe he was the second purchaser referred to by Marquez. When it turned out that he was not in possession of contrabanc and had to be released, the danger increased that he could alert the occupants of that residence to the presence of the police. The ensuing necessity for the police to act promptly to prevent possible destruction of evidence was not the type of emergency strictly of their own making following a period of lack of diligence as in Shuey. The record supports a finding of exigent circumstances justifying the securing of the premises pending the obtaining of a search warrant (Ferdin v. Superior Court, supra, 36 Cal. App. 3d 774, 781-782; People v. Freeny, 37 Cal. App. 3d 20, 32-33), and the arrest of appellant at his home without a warrant, (People v. Ramey, supra, 16 Cal. 3d 263, 276).

Appellant's contentions that the police violated Penal Code Sections 844 and 1531 when they entered the home to secure it pending the obtaining of a warrant, is without merit. The trial court's finding that there was no such violation is amply supported by the record. There was full compliance with the code. Officer Lutz knocked, identified himself, stated his purpose, and demanded that the door be opened. He was refused admittance when appellant falsely told him, "Wait a minute,

wait a minute. I have to put my pants on." (Pen. Code Section 1531; see Machado v. Superior Court, 45 Ca. App. 3d 316, 320.) The officers would have been entitled to force the door, so the conflict in the evidence as to whether or not they did break the door is not determinative, and in any event was resolved against appellant on substantial evidence. (People v. Superior Court (Peck), 10 Cal. 3d 645, 649-650.) Additional circumstances discovered at the door justified immediate entry into the bathroom, where Officer Lutz heard running water after demanding that the female come to the door, and where he in fact disccvered her washing a plastic baggie in the sink.

Appellant ccntends "the search" was unreasonably prolonged. We find the securing of the residence from sometime around midnight until the warrant was served at 3 a.m. was not unreasonably long in light of the inconvenience of obtaining a warrant at that hour of the morning. The subsequent search pursuant to the warrant, which lasted until about 6 a.m. was also not unreasonable in light of the fact that this was a very large house and the evidence sought was the type which could be secreted. The return to the search warrant is five pages long, containing numerous items.

Finally, appellant contends that the magistrate "was not fully advised of the circumstances" in the affidavit for a search warrant. First, appellant contends the affidavit does not say that the premises had been entered and secured pending appliciation for a warrant.

However, Officer Lutz, who obtained the warrant at a judge's house at 2:26 a.m., testified that he discussed with the judge the fact the premises had been entered and secured. Appellant also contends the affidavit did not inform the magistrate that the house was in sheriff's territory rather than the City of Los Angeles. However, the affidavit stated on its face that the warrant was sought to search 30533 Rhone Drive in Rancho Palos Verdes. 1. Appellant also contends the affidavit did not inform the magistrate that appellant and Miss Clewis were under arrest nor did it detail the manner in which entry to the premises was made. These alleged omissions are not material. (People v. Kurland, 28 Cal. 3d 376, 385, 387.) The magistrate's function is limited to determining whether the facts stated in the affidavit support a finding of probable cause. The magistrate's function does not include a determination whether the facts alleged in the affidavit were lawfully obtained. (People v. Cook, supra, 22 Cal. 3d 67, 93-94.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

ASHBY, J.

We concur:

KAUS, P.J.

HASTINGS, J.

1. At the hearing Officer Lutz testified to the working relationship between the Los Angeles Police and the county sheriff's department, and its application to this case.

APPENDIX B

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA,	2d Crim. No. 36804 (LASC No. A193985)
Plaintiff and Respondent,	ORDER MODIFYING OPINION AND DENYING REHEARING
v.	
BERNARD LOUIS BUSHELMAN,	
Defendant and Appellant.	

THE COURT:

It is ordered that the opinion fileld herein on December 11, 1980, be modified in the following particulars:

1. On page 2, line 9 in the second paragraph, the second and third sentences of that paragraph are deleted in their entirety and the following sentence is inserted in their place:

> Appellant contends that circumtances prior to the issuance of the warrant tainted the warrant with illegality.

2. On page 10, line 15, following the word "police" footnote designation 1. is added, and at the bottom of page 10 the following footnote is inserted:

> 1. Contrary to appellant's contention, the fact that this man did not have narcotics in his possession does not negate the probable cause to believe narcotics would be found at the premises.

The addition of thi footnote will cause the subsequent footnote to be renumbered as footnote 2.

Appellant's petition for rehearing is denied.

APPENDIX C

FEB 20 Rec'd

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

FEB - 1961

FEB

I have this day filed Order ____

HELENIC DENIED

In re: 2 Crim. *No.* 36804

People

vs.

Bushelman

Respectfully,

Clerk

Gray, Gray & Gray

18411 Crenshaw Blvd.

Torrance, CA 90504

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT
312 N. Spring Street
Los Angeles, Calif. 90012

SUPREME COURT OF THE
UNITED STATES
OFFICE OF THE CLERK
Washington D.C. 20543

Each said envelope was then, on August 27, 1981, sealed and deposited in the United States mail at Torrance, California, the county in which I am employed, with the postage thereon fully prepaid.

That I caused a copy of the above document to be deposited with the clerk of the court from which the appeal was taken, to be by said clerk delivered to the judge who presided at the trial ofo the cause in the lower court; that I mailed a copy of the above document to the District Attorney fo the County of Los Angeles, addressed as shown above.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27 day of August, 1981, at Torrance, Calif.

Timothy Mock

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 and not a party to the within cause; my business address is 18411 S. Crenshaw Blvd. Torrance I served one copy of the attached PETITION FOR WRIT OF CERTIORARI on each of the following, by placing same in an envelope (or envelopes) addressed respectively as follows:

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LOS ANGELES COUNTY
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SUPERIOR COURT OF THE
STATE OF CALIFORNIA
Honorable Thomas W.
Fredericks
Dept. SW "L"
825 Maple Avenue
Torrance, Calif. 90503